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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

THE TRAVELERS INSURANCE COMPANY, a Corporation,
Petitioner,

vs.

JOHN I. MAGILL, Conservator of ROY A. McCLINTIC, a Person of Unsound Mind,
Respondent.

No. 1031

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

JAMES C. JONES, JR.,
Counsel for Petitioner.

VINCENT L. BOISAUBIN,
Of Counsel.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

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PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

The petition of The Travelers Insurance Company respectfully shows to this Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is an action at law by John I. Magill, substituted conservator of Roy A. McClintic, a person of unsound mind, to recover disability benefits under a life insurance policy issued by petitioner, The Travelers Insurance Company, on the life of Roy A. McClintic on May 27, 1921.

The plaintiff conservator claims that the insured was totally and permanently disabled, within the meaning of the policy, in January, 1925, and seeks disability benefits at the rate of $50 per month from July, 1925 (Tr., pp. 1-6).

The defendant Insurance Company, petitioner herein, claims that the policy lapsed on June 9, 1925 (Tr., p. 10), and that no proof of disability was ever at any time furnished the company by either the insured or by anyone on his behalf (Tr., p. 11). That the furnishing of proof, as required by the policy, is a condition precedent to liability under Missouri law (Tr., p. 11).

Plaintiff (respondent) contends that the insanity of the insured, which, it is claimed, existed at and prior to the lapse of the policy, excused the furnishing of proof, and that, despite the failure to furnish proof, the defendant company is liable for disability benefits from the time of the disability.

The principal issue of law in the case is whether, under Missouri law, insanity excuses, or renders unnecessary, the furnishing of proof of disability under a policy which makes the furnishing of proof a condition precedent to liability. The United States Circuit Court of Appeals for the Eighth Circuit recognized in its opinion that there was no controlling Missouri decision on the question involved. Nevertheless, that Court decided the issue against petitioner, and held that insanity did excuse the furnishing of proof, and that the company was liable for the disability benefits for some fifteen years, despite the failure to furnish proof.

While the case was under submission in the Circuit Court of Appeals (Eighth Circuit), the St. Louis Court of Appeals rendered a decision by a divided court upon the very question involved. The dissenting Judge certified said case to the Supreme Court of Missouri for final decision. The case is now pending in the Supreme Court of

Missouri and is entitled "Frieda A. Schoen, Guardian, etc., of Theodore A. G. Schoen, Appellant, v. American National Insurance Company, a corporation, Respondent," No. 38,488. The case is set for argument on May 21, 1943 (Tr., p. 354).

In petitioner's motion for rehearing before the Circuit Court of Appeals (Eighth Circuit) petitioner called that Court's attention to the pendency of the Schoen case in the Supreme Court of Missouri, and called the Court's attention to the fact that the decision of the Missouri Supreme Court in the Schoen case would settle the applicable law upon the issue before that Court, and requested that the final decision of the Court of Appeals be held in abeyance until the Missouri Supreme Court had decided the Schoen case (Tr., p. 353 et seq.). The Court of Appeals, Eighth Circuit, nevertheless overruled the motion for rehearing. Accordingly, the case must be remanded to the District Court for retrial, with costs against this petitioner, unless stayed in the Court of Appeals until the controlling decision has been rendered by the Missouri Supreme Court in the Schoen case.

B.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

1. Under the decisions of this Court in

> Erie R. R. v. Tompkins, 304 U. S. 64;
> Ruhlin v. New York Life Ins. Co., 304 U. S. 202;
> Lyon v. Mutual Ben. H. & A. Co., 305 U. S. 484;
> Wichita Royalty Co. v. City National Bank, 306 U. S. 103,

the rights of the parties are to be determined by the applicable law of the state. It is important that the rule of this Court, so announced, be followed by the courts of appeal. The Court of Appeals for the Eighth Circuit, under

the circumstances stated in the summary statement, erred in not retaining jurisdiction of the case until the Missouri Supreme Court had announced the applicable Missouri law in the case pending, at the time, before that Court.

2. Under Missouri law, the furnishing of proof of disability is a condition precedent to liability.

Adams v. Met. Life Ins. Co., 74 S. W. (2d) 899, 228 Mo. App. 915;
Moss v. Met. Life Ins. Co., 84 S. W. (2d) 395, 230 Mo. App. 70;
Grafe v. Fid. Mut. L. Ins. Co., 84 S. W. (2d) 400;
Farmers v. Met. Life Ins. Co., 85 S. W. (2d) 235;
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Sapaw v. Met. Life Ins. Co., 94 S. W. (2d) 1082;
Anderson v. Met. Life Ins. Co., 96 S. W. (2d) 631;
Sutherland v. Met. Life Ins. Co., 99 S. W. (2d) 111;
Rowan v. New York Life Ins. Co., 124 S. W. (2d) 577;
Feinberg v. New York Life Ins. Co., 127 S. W. (2d) 82;
Brown v. Mut. Life Ins. Co., 140 S. W. (2d) 91.

"Condition precedent" means that until and unless proof is furnished pursuant to the contract obligation to do so, no liability arises, and nothing that develops after the contract is made excuses the obligation to make proof. "Insanity" is no more an excuse than any one of many things that might subsequently develop to render the performance of the condition difficult or even impossible. The covenant to furnish proof was solely that of the insured. Therefore, the Court erred in holding that insanity excused the furnishing of proof, for to so hold is to ignore and fail to apply the Missouri law that furnishing proof is a *condition precedent* to liability.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals, Eighth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 12,451, John I. Magill, Conservator of Roy A. McClintic, a person of unsound mind, Appellant, v. The Travelers Insurance Company, Appellee, and that the said judgment of the Circuit Court of Appeals, Eighth Circuit, may be reviewed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

THE TRAVELERS INSURANCE COMPANY,

By JAMES C. JONES, JR.,
Counsel for Petitioner.

VINCENT L. BOISAUBIN,
Of Counsel.